

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
DAVIS ELECTRONICS, INC.)	FCC File No. A036934
)	
Licensee of Industrial/Business Pool Station)	
WPNX311, New Albany, Indiana)	
)	
And)	
)	
LOUISVILLE AND JEFFERSON COUNTY)	FCC File No. D125140
METROPOLITAN SEWER DISTRICT)	
)	
Licensee of Industrial/Business Pool Station)	
WPPE838, Louisville, Kentucky)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 2002

Released: 1, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us an Informal Petition Requesting Recission or Modification of License Granted to Davis Electronics, Inc. filed by the Louisville and Jefferson County Metropolitan Sewer District (District) on September 25, 2000¹ and a Status Update and Request for Initiation of Revocation Proceeding in Respect to Louisville and Jefferson County Metropolitan Sewer District Authorization WPPE838 filed by Davis Electronics, Inc. (Davis) on May 2, 2001.² For the reasons discussed below, we deny the District Recission Request and the Davis Revocation Request. On our own motion, however, we propose to modify the District’s license for Station WPPE838, Louisville, Kentucky, to convert the license to a Public Safety Pool license and to change the frequencies of operation to frequency pair 453.475/458.475 MHz.

¹ Louisville and Jefferson County Metropolitan Sewer District, Informal Petition Requesting Recission or Modification of License Granted to Davis Electronics, Inc. (filed Sept. 25, 2000) (“District Recission Request”).

² Davis Electronics, Inc., Status Update and Request for Initiation of Revocation Proceeding in Respect to Louisville and Jefferson County Metropolitan Sewer District Authorization WPPE838 (filed May 2, 2001) (“Davis Revocation Request”).

II. BACKGROUND

2. On April 19, 1999, the District filed an application to operate Industrial/Business Pool Station WPPE838, Louisville, Kentucky, in a conventional mode on the frequency pair 452/457.675 MHz. The District is a government entity that applied for and uses the license in relation to the provision of water, waste and sewer services.³ On April 21, 1999, Davis filed an application for authority to operate an Industrial/Business Pool Station at New Albany, Indiana, in a trunked mode on, *inter alia*, 452/457.675 MHz.⁴ Davis is a corporation that applied for and uses the license “to provide a for profit private carrier mobile relay for those eligible in the business radio service.” On July 22, 1999, the Licensing and Technical Analysis Branch (Branch), Public Safety and Private Wireless Division issued Davis a license to operate Industrial/Business Pool Station WPNX311, New Albany, Indiana, in a trunked mode on, *inter alia*, 452/457.675 MHz.⁵ On November 16, 1999, the Branch issued a license to the District to operate Industrial/Business Pool Station WPPE838, Louisville, Kentucky, on the same frequency pair.⁶

3. On September 25, 2000, the District requested that the Commission either rescind Davis’ license to operate Station WPNX311 or “modify that license to remove the harmful interference caused by it to the [District’s] station WPPE838.”⁷ The District contends that it has been experiencing interference since Davis has been licensed to operate on frequency 452/457.675 MHz.⁸ According to the District, “it has four designated radio frequencies used by its personnel. Each frequency has been assigned to a particular division . . . (*i.e.*, one frequency for sanitary sewer operations, one for engineers, etc.). The radio frequency in question is only utilized by those [District] employees responsible for drainage and flood control operations.”⁹ The District explains that, due to interference on this frequency, it has been forced to move all such communications to one of the other three frequencies.¹⁰

4. The District offers four arguments in support of its request. First, the District contends that Station WPNX311’s license automatically terminated on July 22, 2000 because Davis failed to commence operation within the time required by the Commission’s Rules.¹¹ Second, the District argues that Davis holds more licenses in the Louisville area than the Commission’s Rules permit to be assigned

³ *Id.*

⁴ See FCC File No. D125140 (filed Apr. 19, 1999). The United Telecom Council (UTC) coordinated the District’s application. See FAC No. KY9UU01898.

⁵ See License for Station WPNX311, FCC File No. A036934 (issued July 22, 1999). Davis Electronics, Inc., Application, FCC File No. A036934 (filed Apr. 21, 1999).

⁶ See License for Station WPPE838, FCC File No. D125140 (issued Nov. 16, 1999).

⁷ District Rescission Request at 11.

⁸ *Id.*

⁹ *Id.*, Exhibit C, Affidavit of Bud Schardein (Community Relations and Emergency Response Director for the District) (“Schardein Affidavit”).

¹⁰ See *id.*

¹¹ See *id.* at 2-3 (*citing* 47 C.F.R. § 90.155).

to “a single applicant in a given area for mobile service operations.”¹² Third, the District contends that Davis should not have been granted a license for trunked operations on the subject frequency because its application fails to comply with the coordination requirements for trunked facilities set forth in Section 90.187 of the Commission’s Rules.¹³ Fourth, the District contends that the Commission should rescind or modify Davis’ license to operate Station WPNX311 because any interference caused by Davis poses “an imminent threat to the health and welfare” of the public.¹⁴

5. On May 2, 2001, Davis filed the Davis Revocation Request.¹⁵ Davis states that Station WPNX311 was timely constructed and remains fully operational and offers to provide the Commission with any documentation necessary to confirm the matter.¹⁶ Davis further contends that the District’s assertion that it is licensed for too many channels in the State of Kentucky is similarly misplaced and “not germane to the issue under consideration.”¹⁷ Moreover, Davis contends that, despite the District’s assertions to the contrary, frequencies in the Public Safety Pool are and have been available to the District.¹⁸ Davis concludes that the Commission should initiate a proceeding, pursuant to Section 1.91 of

¹² *Id.* at 7; *see generally id.* at 7-9 (discussing 47 C.F.R. § 90.35).

¹³ *See id.* at 6-7 (*citing* 47 C.F.R. § 90.187).

¹⁴ *Id.* at 9.

¹⁵ *See* Davis Revocation Request. The Policy and Rules Branch (“Policy and Rules Branch”), Public Safety and Private Wireless Division extended the deadline for Davis to file its opposition in this matter to March 15, 2001 to permit the parties to continue settlement negotiations to resolve this matter. Absent any extension of time, Davis would have been required to file its opposition on or before October 5, 2000. *See* 47 C.F.R. §§ 1.4, 1.45. Davis filed requests for extensions of time on October 5 and November 30, 2000 without opposition from the District. *See* Davis Electronics, Inc., Motion for Extension of Time (filed Oct. 5, 2000); Davis Electronics, Inc., Motion for Further Extension of Time (filed Nov. 30, 2000). On December 13, 2000, we granted a limited extension of time and required Davis and the District to file written reports describing their efforts to resolve this matter and the results of their settlement negotiations on or before January 16, 2001. *See* Davis Electronics, Inc., FCC File No. 9904A036934, *Order*, DA 00-2800 (WTB PSPWD rel. Dec. 13, 2000) (*Extension of Time Order*). On January 16, 2001, Davis and the District informed us that, although settlement negotiations were ongoing, the parties had been unable to resolve this matter. *See* Davis Electronics, Inc., Status Report (filed Jan. 16, 2001); Louisville and Jefferson County Metropolitan Sewer District, Report Concerning Negotiations (filed Jan. 16, 2001). In response, we gave the parties until March 15, 2001 to resolve the matter and required Davis to file its opposition on or before that date. *See* Letter from John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to R. Bruce Beckner, Esq. and Elizabeth R. Sachs, Esq. (Feb. 14, 2001) (“February 14 Branch Letter”); *see also* Letter from R. Bruce Beckner, Esq. and Steven J. Hamrick, Esq., to John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (filed April 10, 2001) (“April 10 District Letter”). Davis explains that, until it received the April 10 District Letter, it was unaware of the February 14 Branch Letter requiring Davis to file its opposition in this matter by March 15, 2001. *See id.* at 4 n.4.

¹⁶ *See id.* at 2 n.1.

¹⁷ *Id.*

¹⁸ *See id.* at 4-7. After Davis disclosed the availability of public safety frequencies, the District contacted the Association of Public-Safety Communications Officials (APCO) to request coordination. The District also requested a number of extensions of time to further negotiate a resolution of this matter with Davis. *See* Louisville and Jefferson County Metropolitan Sewer District, Consent Motion for Extension of Time (filed May 17, 2001) (“Extension of Time Motion”); Louisville and Jefferson County Metropolitan Sewer District, Consent Motion for (continued....)

the Commission's Rules,¹⁹ to revoke the District's authorization to operate Station WPPE838 on the subject frequency pair on the basis that the District is ineligible to hold the authorization for an Industrial/Business Pool frequency channel.²⁰

6. On July 6, 2001, the District filed an Opposition to Request for Initiation of Revocation Proceeding and Alternative Request for Waiver *Nunc Pro Tunc*.²¹ First, the District argues that any opposition filed by Davis is untimely and should not be considered.²² According to the District, Davis' "cursory attempt" to show that Station WPNX311 was timely constructed and remains operational is unsupported by the record and insufficient to overcome the sworn affidavits filed with the District Recission Request.²³ The District therefore reasons that we should grant its requested relief as unopposed.²⁴ Second, the District argues that it is properly licensed to operate Station WPPE838 on Industrial/Business Pool frequency pair 452/457.675 MHz.²⁵ In the alternative, if we were to determine that the District is ineligible to operate on the subject Industrial/Business Pool channel, it "requests a waiver, *nunc pro tunc* dating back to April 19, 1999 (the date [that] it filed its application for [Station] WPPE838 with the Commission), of Section 90.35(a) of the Commission's [R]ules, which restricts

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Extension of Time (filed May 25, 2001); ("Second Request"); Louisville and Jefferson County Metropolitan Sewer District, Consent Motion for Extension of Time (filed June 25, 2001) ("Third Request"). Unfortunately, the parties failed to resolve this matter.

¹⁹ 47 C.F.R. § 1.91.

²⁰ See Davis Revocation Request at 5-7 (discussing 47 C.F.R. § 90.35).

²¹ Louisville and Jefferson County Metropolitan Sewer District, Opposition to Request for Initiation of Revocation Proceeding and Alternative Request for Waiver *Nunc Pro Tunc* (filed July 6, 2001) ("District Opposition"). The District filed requests for extensions of time on May 17, May 25, and June 25, 2001. See Louisville and Jefferson County Metropolitan Sewer District, Consent Motion for Extension of Time (filed June 25, 2001); Louisville and Jefferson County Metropolitan Sewer District, Consent Motion for Extension of Time (filed May 24, 2001); Louisville and Jefferson County Metropolitan Sewer District, Consent Motion for Extension of Time (filed May 17, 2001). By letters dated May 22 and June 28, 2001, the Branch granted the District additional time and required it to file its opposition by July 6, 2001. See Letter from John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to R. Bruce Beckner, Esq., and Elizabeth R. Sachs, Esq. (June 28, 2001); Letter from John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to R. Bruce Beckner, Esq., Fleischman and Walsh, LLP and Elizabeth R. Sachs, Esq., Lukas, Nace, Guterrez & Sachs, Chtd. (May 22, 2001).

²² See District Opposition at 2-4.

²³ *Id.* at 4.

²⁴ See *id.*

²⁵ See *id.* at 5.

eligibility for the Industrial/Business pool frequencies of 425/457.675 MHz.”²⁶ Davis filed its reply in the instant matter on July 13, 2001.²⁷

7. On September 20, 2001, District filed an application for a license to operate on conventional Public Safety Pool frequencies 453.475/458.475 MHz.²⁸ On November 29, 2001, the Branch granted that application.²⁹

III. DISCUSSION

A. The District Recission Request

8. We find no basis to rescind or modify the license granted to Davis on July 22, 1999 for the operation of Station WPNX311. The record in this proceeding fails to support the District’s contention that “Davis is no longer authorized to operate station WPNX311 because it has not complied with Section 90.155 of the Commission’s Rules.”³⁰ Pursuant to Section 90.155(a) of the Commission’s Rules, Davis was required to place Station WPNX311 into operation by July 22, 2000 to prevent the license from automatically canceling and reverting back to the Commission.³¹ The District alleges that it conducted tests at that time and concluded that there were no voice or data communications on the subject frequency.³² According to the District, it nevertheless experienced interference at that time due to alleged testing by Davis on frequency pair 452/457.675 MHz.³³ Davis states that the District’s “mischaracterization of transmissions” on the subject frequency “likely are due to [an] unfamiliarity with the operation of the Logic Trunked Radio (“LTR”) systems [employed by Davis].”³⁴ Such a conclusion would also explain the interference that the District reported. In any event, we find that Davis presented the Commission with adequate evidence that it timely placed Station WPNX311 into operation.

²⁶ *Id.* at 5-6 (internal citations omitted).

²⁷ Davis Electronics, Inc., Reply to Opposition to Request for Initiation of Revocation Proceeding and Alternative Request for Waiver *Nunc Pro Tunc* (filed July 13, 2001).

²⁸ FCC File No. 0000598264.

²⁹ *See* License for Station WPTR589 (issued Nov. 29, 2001). Thereafter, the Policy and Rules Branch convened a meeting of the parties to discuss whether this matter had been resolved or if the parties could do so in a mutually beneficial manner. The Policy and Rules Branch gave the parties until January 7, 2002 to reach an agreement. The parties were unable to resolve this matter.

³⁰ District Recission Request at 2 (*citing* 47 C.F.R. § 90.155).

³¹ *See* 47 C.F.R. § 90.155(a).

³² *See* District Recission Request at 3 (*citing* the attached Affidavit of Rick Watkins, Special Assistant to the Director).

³³ *See id.* We address the District’s subsequent contention that it is experiencing interference from the unauthorized use of a former licensee on Public Safety Pool frequencies 453.475/458.475 MHz in our discussion of the Davis Revocation Request below.

³⁴ Davis Reply at 7.

9. We find the District's remaining arguments similarly unpersuasive.³⁵ The District's accusation that Davis is warehousing frequencies in violation of Section 90.35(e) of the Commission's Rules is misguided. Section 90.35(e) of the Commission's Rules permits the assignment of additional frequencies to a single applicant for mobile service operations in a given area upon a satisfactory showing of need.³⁶ The District offers no discussion of whether Davis made the requisite showing of need for its channels. Rather, the District implies that Davis is warehousing spectrum simply because it has been assigned more than one frequency in this area.³⁷ We disagree. We find nothing in the record to indicate that Davis failed to satisfy the threshold requirement of Section 90.35(e) of the Commission's Rules. Accordingly, for the reasons discussed above, we find no basis to rescind or modify the license granted to Davis on July 22, 1999 for the operation of Station WPNX311.

B. The Davis Revocation Request

10. Davis argues that the District is not eligible, under Section 90.35 of the Commission's Rules,³⁸ to hold a license to operate on the subject frequency in the Industrial/Business Radio Pool.³⁹ We agree. Section 90.35(a) of the Commission's Rules⁴⁰ provides:

a) Eligibility. Persons primarily engaged in any of the following activities are eligible to hold authorizations in the Industrial/Business Pool to provide commercial mobile radio service as defined in Part 20 of this chapter or to operate stations for transmission of communications necessary to such activities of the licensee:

- (1) The operation of a commercial activity;
- (2) The operation of educational, philanthropic, or ecclesiastical institutions;
- (3) Clergy activities; or
- (4) The operation of hospitals, clinics, or medical associations.

The District does not fall within any of those categories. We also agree with Davis that the *Refarming Second Report and Order*⁴¹ referenced by the District⁴² actually undermines, rather than supports, the District's insistence that it is eligible to secure an authorization in the Industrial/Business Pool because

³⁵ Our action in this matter renders moot further consideration of the District's argument that Davis should not have been coordinated for trunked operations pursuant to 47 C.F.R. § 90.187.

³⁶ See 47 C.F.R. § 90.35(e).

³⁷ See District Recission Request at 7-9. We note that the District itself has been assigned multiple frequencies in this band.

³⁸ 47 C.F.R. § 90.35.

³⁹ See Davis Revocation Request at 5-7; Davis Reply at 9-12.

⁴⁰ 47 C.F.R. § 90.35(a).

⁴¹ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services, *Second Report and Order*, 12 FCC Rcd 14307 (1997) (*Refarming Second Report and Order*).

⁴² See District Opposition at 5.

government utilities were not included in the category of entities eligible in the Industrial/Business Pool.⁴³

11. We deny the District's request for a retroactive waiver⁴⁴ of the eligibility restrictions of Section 90.35 of the Commission's Rules.⁴⁵ The District argues that it qualifies for the requested relief under the second prong of the Commission's waiver standard set forth in Part 1 of its Rules.⁴⁶ In order to obtain a waiver pursuant to Section 1.925(b)(3)(ii) of the Commission's Rules, the District must demonstrate that "[i]n view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."⁴⁷ For the reasons discussed below, we find that the District failed to make such a showing.

12. The District's waiver request is predicated on the alleged unavailability of suitable public safety frequencies in Louisville, Kentucky.⁴⁸ According to the District, it applied for the subject frequency in the Industrial/Business Radio Pool on the "working knowledge that there were no available public safety channels in Louisville."⁴⁹ Although Davis continually suggested that the District apply for frequencies from the Public Safety Pool, the District failed to do so. The District states that it "learned on May 16, 2001 that a single frequency pair in the Public Safety Pool in Louisville had become available" and immediately sought coordination for that frequency from APCO on May 17, 2001.⁵⁰ Since we have now issued the District an authorization for frequencies in the Public Safety Pool, we conclude that it would not be inequitable to require it to operate on the Public Safety Pool frequencies for which it is eligible. Accordingly, we deny its request for waiver.

13. The District argues that it should not be required to operate on the frequencies licensed to it under call sign WPTR589 because the Kentucky Correctional Institute for Women ("Institute") is allegedly operating on those frequencies on an expired license.⁵¹ The District cites no authority for the

⁴³ See *Refarming Second Report and Order*, 12 FCC Rcd at 14322 ¶ 27.

⁴⁴ See District Opposition at 5-7. We need not address the retroactive nature of the District's waiver request because, as explained below, the District fails to satisfy the threshold burden that granting a waiver is warranted under the circumstances presented.

⁴⁵ 47 C.F.R. § 90.35.

⁴⁶ See 47 C.F.R. § 1.925(b)(3)(ii).

⁴⁷ *Id.*

⁴⁸ See District Opposition at 6 ("without a grant of its waiver request . . . , [it] cannot obtain the channels necessary for it to provide . . . service to the public"); *id.* ("[g]iven the lack of available public safety channels in Louisville, a waiver in this case would benefit the public interest"); *id.* at 7 ("[i]f the Branch did not grant this waiver, [the District] could not operate its system as rapidly or efficiently, as there were no public safety channels in Louisville of which it could avail itself").

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 6 n.6.

⁵¹ See Louisville and Jefferson County Metropolitan Sewer District's Response to Davis' Statue Report, filed Jan. 23, 2002 at 1-2.

proposition that purported unauthorized operation on a frequency should be considered in determining whether an entity can and should be licensed on such frequency; furthermore, we are not aware of any such authority. The District is fully authorized to operate on the channel pair, and any unlicensed operation by the Institute would be a violation of Section 301 of the Communications Act of 1934, as amended.⁵²

14. Based upon our analysis, we conclude that the District's application for the subject frequency pair 452/457.675 MHz should not have been coordinated because the District was not eligible to obtain an authorization on Industrial/Business frequencies. We find that initiation of revocation proceedings against the District's station is unnecessary in the instant matter because we can resolve this matter by modifying the District's license to specify operation on Public Safety Pool frequencies that are already available to the District. Therefore, we believe that Section 316(a) of the Communications Act of 1934, as amended, provides the appropriate vehicle for resolving this matter.⁵³ Section 316(a)(1) permits the Commission to modify a station license if the action will promote the public interest, convenience, and necessity.⁵⁴ In this connection, we note that the proposed modification would serve the public interest by eliminating interference between Davis and the District and by ensuring that the District is operating on frequencies for which it is eligible.⁵⁵

15. Thus, we believe that a modification of the District's license to operate as a Public Safety Pool station and to change the operating frequencies to 453.475/458.475 MHz is appropriate to prevent harmful interference to Davis. In accordance with Section 1.87(a) of the Commission's Rules,⁵⁶ we will not issue a modification order until the District has received notice of our proposed action and has had an opportunity to interpose a protest. To protest the modification, the District must, within thirty days of the release date of this *Memorandum Opinion and Order*, submit a written statement with sufficient evidence to show that the modification would not be in the public interest. The protest must be filed with the Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., Room TW-A325, Washington, D.C. 20554. If no protest is filed, the District will have waived its right to protest the modification and will be deemed to have consented to the modification.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that pursuant to Section 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309(d) and Section 1.45 of the

⁵² 47 U.S.C. § 301. If the District receives interference from unlicensed operation, it can request the assistance of the Commission's Enforcement Bureau. Further, on our own motion, we will refer the District's contention of unauthorized operation on the subject frequency pair to the Commission's Enforcement Bureau for investigation and appropriate action.

⁵³ 47 U.S.C. § 316(a)(1).

⁵⁴ *Id.*

⁵⁵ We recognize that, as modified, the District's license may be duplicative in light of the license issued under call sign WPTR589. In lieu of accepting the modification of the license for Station WPPE838, the District may choose to turn in the license for Station WPPE838 for cancellation and operate under the license for Station WPTR589.

⁵⁶ 47 C.F.R. § 1.87(a).

Commission's Rules, 47 C.F.R. § 1.45, the Informal Petition Requesting Recission or Modification of License Granted to Davis Electronics, Inc. filed by the Louisville and Jefferson County Metropolitan Sewer District on September 25, 2000 IS DENIED.

17. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309(d) and Section 1.91 of the Commission's Rules, 47 C.F.R. § 1.91, the Status Update and Request for Initiation of Revocation Proceeding in Respect to Louisville and Jefferson County Metropolitan Sewer District Authorization WPPE838 filed by Davis Electronics, Inc. on May 2, 2001 IS DENIED.

18. IT IS PROPOSED, pursuant to Sections 4(i) and 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 316(a), and Section 1.87 of the Commission's Rules, 47 C.F.R. § 1.87, that the license for Private Land Mobile Radio Services Station WPPE838, held by Louisville and Jefferson County Metropolitan Sewer District, BE MODIFIED by changing the station to a Public Safety Pool station and by changing the frequencies of operation to 453.475/458.475 MHz.

19. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* shall be sent by certified mail, return receipt requested, to District's counsel, Steven J. Hamrick, Esq., Fleischman and Walsh, L.L.P., 1400 16th Street, N.W., Washington, DC 20036.

20. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau